Supremacy of the Constitution: An Appraisal of the Supreme Court's Decision in UDEOGU v FRN & 2 ORS

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The Supreme Court of Nigeria on 8th May, 2020 in Appeal No. SC. 622C/2019 declared Section 396(7) of the Administration of Criminal Justice Act 2015 (ACJA), null and void. The consequences of this Supreme Court decision on the dispensation of criminal justice and the personality of the 2nd Respondent, gave the judgement much attention and publicity. One of the objectives of the ACJA is the speedy dispensation of justice, and as such, Section 396(7) of the ACJA seeks to forestall delay in criminal trials, as a result of the elevation of Judges.

Brief Facts of the Case

Dr. Orji Uzor Kalu and the Appellant were charged before Hon. Justice M. B. Idris of the Lagos Division of the Federal High Court, on several counts. Hon. Justice M. B. Idris was elevated to the Court of Appeal and took his Oath of office as a Justice of the Court of Appeal. At the instance of 1st Defendant/2nd Respondent (Dr. Orji Uzor Kalu) and based on Section 396(7) of the ACJA, the President of the Court of Appeal issued a fiat to M. B. Idris, JCA, to conclude the trial and deliver udgement before September 2018.

The 2nd Defendant (Appellant) appealed against a Ruling delivered at the FHC sitting, and challenged the competence of M. B. Idris, JCA to continue to sit and hear the Charge. The Court of Appeal dismissed the appeal. On appeal to the Supreme Court, the issue for determination was:

"Whether the Court of Appeal was right when it held that Section 396(7) of the ACJA vests a Justice of the Court of Appeal with requisite power to sit and continue part-heard matters at the Federal High Court, and whether the said section is not contrary to Sections 250(2) and 253 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)?"

The Supreme Court relied on Sections 1(3), 237, 249, & 253 of the 1999 Constitution; Section 19(3) & (4) of the Federal High Court Act, as well as the Apex Court's earlier decisions in **Ogbunyinya & Ors v Okudo & Ors (1979) NSCC 77 and Our Line Ltd v S.C.C. Nigeria Ltd & Ors (2009) 17 NWLR (Pt. 1170) 383** to declare the fiat, the purported trial, conviction and sentencing of the Appellant by M. B. Idris JCA, null and void. Consequently, the Supreme Court ordered that trial should commence de novo before another Judge of the Federal High Court.

The Constitutional Validity of Section 396(7) of the ACJA To forestall trial de novo which protracts criminal prosecution, Section 396(7) of the ACJA provides: "Notwithstanding the

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provisions of any other law to the contrary, a Judge of the High Court who has been elevated to the Court of Appeal shall have dispensation to continue to act as a High Court Judge only for the purpose of concluding any part-heard criminal matter pending before him at the time of his elevation, and shall conclude the same within a reasonable time".

There is no definition of the phrase "any other law", in the ACJA. Therefore, to ascertain whether the 1999 Constitution can possibly fall within the overriding ambit of the phrase "any other law", it is necessary to juxtapose the provision of Section 396(7) of the ACJA with Sections 1(3) (which provides for the supremacy of the Constitution over any other law in Nigeria), 237 (which establishes the Court of Appeal and the Composition of the Court), 249 (which establishes the Federal High Court) and 253 (which stipulates the composition of the Federal High Court).

Based on Section 1(3) of the 1999 Constitution and Supreme Court decision in INEC v Alhaji Balarabe Musa (2003) LPELR – 24927 (SC), it is clear that the provisions of the 1999 Constitution cannot for whatever reason fall within the overriding ambit of the phrase "any other law". The Supreme Court in **INEC v Alhaji Balarabe Musa (Supra) at page 35-36** held that, where the Constitution has enacted exhaustively in respect of any situation, conduct or subject, a body that claims to legislate in addition to what the Constitution had enacted, must show that it had derived the legislative authority to do so from the Constitution.

Also, the Supreme Court in **Madukolu & Ors v Nkemdilim & Anor (1962) 2 SCNLR 341** settled the law to the effect that, a court must be duly constituted in its composition and qualification before it can exercise adjudicatory powers. The ineluctable implication is that a Federal High Court cannot be properly constituted, when the proceedings before it is presided over by a Justice of the Court of Appeal. The above ineluctable implication is supported by Section 19(3) & (4) of the Federal High Court Act.

Suffice it to say that, it is judicial rascality for the Chief Judge of the Federal High Court to give directions to a Justice of the Court of Appeal in respect of a matter pending before the Federal High Court, just as it is improper for the President of the Court of Appeal (PCA) to give directions to a Justice of the Court of Appeal in respect of a matter pending before the Federal High Court, as such act of the PCA will be ultra vires.

Furthermore, the Supreme Court's decision in **Ogbunyinya & Ors v Okudo & Ors (1979) NSCC 77** which the Apex Court relied on in Our Line Ltd v S.C.C. Nigeria Ltd & Ors (2009) 17 NWLR (Pt. 1170) 383 and in the instant Appeal, remains a good law and a reference point for subsequent decisions. In Ogbunyinya & Ors v Okudo & Ors (Supra), the matter was heard by Nnaemeka-Agu J. of the High Court of Onitsha in the former Eastern Nigeria. After listening to the address of Counsel on both sides on 13th June, 1977, His lordship adjourned the suit to 17th June, 1977 when the judgement was delivered. Meanwhile, before His lordship delivered the judgement, he was elevated to the Court of Appeal on 15th June, 1977. Upon appeal to the Supreme Court, the judgement of Nnaemeka-Agu J. and the decision of the Court of Appeal was declared null and void and set aside, on the ground that the learned trial Judge had no jurisdiction to do so.

".....IT REMAINS UNCONSTITUTIONAL FOR A JUDGE TO SIMULTANEOUSLY PUT ON TWO CAPS OF DIFFERENT COURTS, IN THE HIERARCHY OF COURTS. ALSO, THE CONSTITUTION CAN BE AMENDED TO ALLOW FOR A "PERIOD OF GRACE", BEFORE THE FORMAL APPOINTMENT/ ELEVATION OF A JUDGE TO A HIGHER COURT WITHIN THE HIERARCHY OF COURTS"

Another very important reference in the instant appeal was the "persuasive decision" of Kolawole JCA in Charge No: FHC/ABJ/CR/85/2009 between: **FRN v Iwueke & Ors on 25/1/2019** wherein His lordship stated that the provision of Section 396(7) of the ACJA is no doubt a laudable intention, but it cannot be driven through unless the extant provisions of the Constitution are amended to enable a Judge appointed pursuant to the Constitution to wear two caps, as a Judge of the Federal High Court and of the Court of Appeal.

The point therefore, remains that the adjudicatory authority of a Judge ceases upon his elevation/appointment to a higher court, and any act subsequently done in his former capacity becomes null and void. The powers donated or vested by the establishing Act of a court can only be exercised within the limits prescribed by that statute, and by the authority or person to whom they are donated or vested. See the case of Sanusi v Ayoola (1992) 9 NWLR (Pt 265) 275 at 293.

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Conclusion

Although this is the first time the Supreme Court will make pronouncement on Section 396(7) of the ACJA, several judgements have been delivered with fiats granted pursuant to that provision of the law. This decision of the Supreme Court does not necessarily nullify those judgements until there is an appeal against them, and the validity of the provision of Section 396(7) is challenged.

Howbeit, it is anticipated that this Supreme Court decision will open floodgate of appeals and render the mischief sought to be cured by Section 396(7) of the ACJA unabated, unless the Constitution is amended. For this reason, the National Assembly may consider infusing the ACJA into the Constitution, like the Land Use Act.

However, until such amendment is made, it remains unconstitutional for a Judge to simultaneously put on two caps of different courts, in the hierarchy of courts. Also, the Constitution can be amended to allow for a "period of grace", before the formal appointment/elevation of a Judge to a higher Court within the hierarchy of courts. The Judge will utilise the period of grace to conclude matters that have reached an advanced stage, before taking the Oath of office.

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